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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1984

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SUPREME COURT, U.S.

O.L. McCOTTER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
PETITIONER

VS.

CLIFTON FRANSAW,
RESPONDENT.

CASE NO. 84-1957

RESPONDENT'S MOTION TO DISMISS, PETITIONER'S PETITION FOR WRIT OF CERTIORARI, FOR LACK OF SUBJECT MATTER JURISDICTION

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW CLIFTON FRANSAW, RESPONDENT HEREIN, AND FILES THIS HIS MOTION TO DISMISS, PETITIONER'S PETITION FOR WRIT OF CERTIORARI, FOR LACK OF SUBJECT MATTER JURISDICTION. AND IN SUPPORT THEREOF WOULD SHOW UNTO THIS HONORABLE COURT THE FOLLOWING:

I.

ON MARCH 9, 1984, FRANSAW FILED AN APPLICATION FOR WRIT OF HABEAS CORPUS, PURSUANT TO 28 U.S.C. SEC. 2254, IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, CHALLENGING THE CONSTITUTIONALITY OF HIS PRIOR STATE COURT CONVICTION STYLED FRANSAW V. Mc KASKLE, CAUSE NO. H-84-1087, THAT WAS USED FOR ENHANCEMENT PURPOSES IN HIS 1981 TRIAL.

ON JULY 7, 1984, THE STATE MOVED TO DISMISS ON THE GROUNDS THAT FRANSAW HAD FAILED TO EXHAUST HIS STATE REMEDIES, AND HAD PROCEDURALLY DEFAULTED HIS CLAIMS., UNDER ENGLE V. ISAAC, 456 U.S. 107 (1982), AND WAINWRIGHT V. SYKES, 433 U.S. 72 (1977).

II.

ON SEPTEMBER 20, 1984, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ENTERED A MEMORANDUM AND ORDER DENYING THE WRIT BASED UPON THE CLAIM THAT:

"FRANSAW'S VIOLATION OF THE CONTEMPORANEOUS OBJECTION RULE, BARS FEDERAL HABEAS REVIEW OF HIS STATE COURT CONVICTION, AND FRANSAW CANNOT ESTABLISH "CAUSE AND PREJUDICE" FOR HIS PROCEDURAL DEFAULT UNDER STATE LAW."

FRANZAW THEN FILED NOTICE OF APPEAL, BUT THE DISTRICT COURT DENIED HIM A CERTIFICATE OF PROBABLE CAUSE TO APPEAL. AND ON JANUARY 30, 1985, A PANEL OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT "GRANTED" A CERTIFICATE OF PROBABLE CAUSE, "VACATED AND REMANDED" THE PANEL REASONED AS FOLLOWS:

"THE STATE COURTS CONSIDERED THE MERITS OF THE TWO ISSUES RAISED IN THE FEDERAL HABEAS CORPUS PETITION. WHERE THE STATE COURTS THEMSELVES HAVE NOT RELIED ON THE "CONTEMPORANEOUS OBJECTION" RULE BUT INSTEAD HAVE DEALT WITH THE ISSUES RAISED ON THE MERITS, THE PROCEDURAL BAR OF ENGLE V. ISAAC AND WAINWRIGHT V. SYKES, DOES NOT APPLY. MORAN V. ESTELLE, 607 F.2d 1140 1142 (5TH CIR. 1979)."

ON MARCH 11, 1985, THE COURT OF APPEALS DENIED THE STATES SUGGESTION OF REHEARING EN BANC. AND THE STATE "FAILED" TO FILE A MOTION TO STAY THE MANDATE OF THE COURT OF APPEALS, AND ON MARCH 25, 1985, THE MANDATE ISSUED, AND THE DISTRICT COURT WAS ONCE AGAIN VESTED WITH JURISDICTION OVER THIS CAUSE.

III.

THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN, PETITIONER'S CERTIORARI IN THIS CAUSE; DUE TO THE CERTIORARI PETITION BEING "JURISDICTIONALLY OUT OF TIME," AS SHOWN BY THE FOLLOWING:

A. SUPREME COURT RULE NO. 20 (1) (3) PROVIDES:

(1) A PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGEMENT IN A CRIMINAL CASE OF A STATE COURT OF LAST RESORT OR A FEDERAL COURT OF APPEALS OR A DECISION OF THE UNITED STATES COURT OF MILITARY APPEALS (SEE 28 U.S.C. 1259) RENDERED AFTER JUNE 1, 1984, SHALL BE DEEMED IN TIME WHEN IT IS FILED WITH THE CLERK WITHIN SIXTY (60) DAYS AFTER THE ENTRY OF SUCH JUDGEMENT. A JUSTICE OF THIS COURT, FOR GOOD CAUSE SHOWN, MAY EXTEND THE TIME FOR APPLYING FOR A WRIT OF CERTIORARI IN SUCH CASES FOR A PERIOD NOT EXCEEDING 30 DAYS.

(3) THE CLERK WILL REFUSE TO RECIEVE ANY PETITION FOR A WRIT OF CERTIORARI WHICH IS JURISDICTIONALLY OUT OF TIME.

B. ON JANUARY 30, 1985, A PANEL OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, VACATED AND REMANDED RESPONDENT'S HABEAS CORPUS PETITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION. (SEE EXHIBIT NO.# -1-, ANNEXED HERETO).

C. ON FEBRUARY 25, 1985, PETITIONER FILED HIS HIS "SUGGESTION FOR REHEARING EN BANC," (WHICH WAS TREATED BY THE COURT OF APPEALS, AS A PETITION FOR PANEL REHEARING).

D. ON MARCH 11, 1985, THE FIFTH CIRCUIT COURT OF APPEALS, DENIED PETITIONER'S PETITION FOR "REHEARING EN BANC". (SEE, EXHIBIT NO.#-2-, ANNEXED HEREIN). NO MOTION FOR STAY OF COURT OF APPEALS MANDATE, WAS FILED BY PETITIONER. MANDATE OF THE COURT OF APPEALS WAS ISSUED ON MARCH 25, 1985.

E. SINCE PETITIONER'S CERTIORARI PETITION WAS FILED IN THIS COURT ON JUNE 14, 1985, THE "CERTIORARI" PETITION IS "JURISDICTIONALLY" OUT OF TIME. THE COURT OF APPEALS REHEARING DENIAL WAS MADE ON MARCH 11, 1985.

PETITIONER'S CERTIORARI PETITION, HAD TO BE FILED IN THIS COURT, ON OR BEFORE MAY 12, 1985, UNLESS HE OBTAINED AN "EXTENSION" OF TIME FROM A JUSTICE OF THIS COURT. SEE, RULE 20 (1) (3).

F. IF, PETITIONER'S TIME FOR FILING THE CERTIORARI PETITION, STARTED TO RUN FROM THE COURT OF APPEALS MANDATE ISSUANCE OF MARCH 25, 1985., PETITIONER CAN FAIR NO BETTER. THE CERTIORARI PETITION, WOULD STILL HAD TO BEEN FILED ON OR BEFORE, MAY 26, 1985.

IV.

C O N C L U S I O N

WHEREFORE, ALL THINGS CONSIDERED, RESPONDENT RESPECTFULLY SUBMITS THAT THIS COURT, MUST DISMISS THE CERTIORARI PETITION FOR BEING JURISDICTIONALLY OUT OF TIME, AND THIS COURT WITHOUT JURISDICTION OVER THE SUBJECT MATTER.

RESPECTFULLY SUBMITTED

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